

UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

\* \* \* \* \*

BETCO CORPORATION, LIMITED,

Plaintiff,

-vs-

Case No. 14-CV-193-WMC

MALCOLM D. PEACOCK, MARILYN  
PEACOCK, B HOLDINGS, INC., and  
E HOLDINGS, INC.,

Madison, Wisconsin  
June 17, 2015  
8:33 a.m.

Defendants.

\* \* \* \* \*

STENOGRAPHIC TRANSCRIPT OF THIRD DAY OF COURT TRIAL  
HELD BEFORE CHIEF JUDGE WILLIAM M. CONLEY,

APPEARANCES:

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United States District Court  
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608-255-3821

1 APPEARANCES CONTINUED:

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8 \* \* \* \* \*

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13 \* \* \* \* \*

14 (Proceedings called to order.)

15 THE CLERK: Case Number 14-CV-193-WMC. *Betco*  
16 *Corporation, Limited v. Peacock, et al.* called for the  
17 third day of court trial. May we have the appearances,  
18 please.

19 MR. MOORE: Attorney David Moore appears for  
20 the plaintiff, along with Reggie Jackson, Attorneys Tim  
21 Nackowicz and Sarah Gehrig here in the courtroom.

22 MR. BIANCHI: And for defendants, Attorneys  
23 Albert Bianchi and Mary Turke. And then we have our  
24 client, defendant Malcolm Peacock.

25 THE COURT: Very good. We're here for closing

1 arguments on liability, and because plaintiff has the  
2 burden of proof on at least everything but perhaps the  
3 affirmative defense, we'll hear from plaintiffs first.

4 MR. MOORE: Thank you, Your Honor. I want to  
5 attempt here to address the questions the Court raised  
6 at the end of the day yesterday in the context of our  
7 closing argument on liability. And I want to, as best I  
8 can, specifically address the question of relative duty  
9 between the parties that I understood the Court was  
10 discussing. And I also want to address the question of  
11 causation, without addressing damages in full, but the  
12 relationship of damages to --

13 THE COURT: I think of it as injury in the  
14 sense that to get to damages, we have to have injury.

15 MR. MOORE: Right. I'd like to begin with --  
16 and I think the Court also commented on the fact that  
17 what Judge Posner appears to be suggesting, what he  
18 implies in the *Market Street* case is that there is a  
19 duty of candor that applies in a post-contract good  
20 faith situation that does not apply in the pre, in the  
21 contract formation stage. That's what I understand that  
22 he is saying. He doesn't say it directly because he  
23 uses the phrase candor in the negative sense and then  
24 comes back to it, but that's what I understand it to  
25 mean and that's what I understood the Court was

1 articulating. I agree with that.

2       The Court has verbalized -- this Court has  
3 verbalized a struggle with what it characterizes as the  
4 duty to come forward and was there a duty to come  
5 forward on the part of Mr. Peacock and therefore how  
6 does his duty of candor relate to the duty to come  
7 forward. I understand the Court has suggested three  
8 areas of inquiry that are categorized around things that  
9 Betco didn't know about and didn't address, perhaps as  
10 quickly as it might have depending on one's view of the  
11 facts. The Court talked about the boilers, and it  
12 talked about products not meeting spec and why not, and  
13 certificates of analysis, CoAs being falsified. What  
14 was the duty of coming forward in relation to Betco's  
15 duty to act.

16       I am going to beg the Court's indulgence for a  
17 moment though to take one step back from those inquiries  
18 and get to the question of duty in general and I want to  
19 address that duty to come forward as the Court has  
20 characterized it in relationship to the duty of good  
21 faith.

22       The Court also pointed to Judge Posner's  
23 characterization of good faith in *Market Street*, and the  
24 quote precisely is that "This duty is," this duty that  
25 the Court was trying to articulate is "as it were

1 halfway between a fiduciary duty, the duty of utmost  
2 good faith," in parens, in italics, "and the duty merely  
3 to refrain from active fraud." So it's as if we have  
4 this long chain across the courtroom and over on the  
5 right we have fiduciary duty and over here we have  
6 fraud. It's clear I think from *Market Street* and from  
7 the cases that come after it and even some that come  
8 forward that that duty, wherever it hangs on that chain  
9 across the courtroom, it depends on the facts and  
10 circumstances of the case.

11 I want to start with a premise, important -- not a  
12 premise, a fact. This is no longer a tort case based on  
13 the Court's decision. I understand it. It is a  
14 contract case.

15 THE COURT: It is.

16 MR. MOORE: And even though the Court dismissed  
17 the breach of contract cause of action, the duty of good  
18 faith and fair dealing is a contract cause of action.

19 THE COURT: At least in Wisconsin.

20 MR. MOORE: Yes. And we could argue the point  
21 elsewhere. As I've discussed with my colleagues, the  
22 law in Ohio is definitely different. But this is a  
23 breach of contract case. And the APA here puts in play  
24 two contractual duties at least. One is express. At  
25 least one that's express and one that's implied. And

1 the one that's express that I'm going to point to for  
2 the moment is in Section 4.19 of the contract. It deals  
3 with the express warranties and representations made by  
4 the seller. And the quotation is the first clause of  
5 that paragraph up until the comments followed by the  
6 conjunctive *and*. What it says is "Each item processed  
7 or delivered by seller has been in conformity with all  
8 applicable contractual commitments and all express and  
9 implied warranties."

10 THE COURT: I'm glad you started there because  
11 the more I look at that clause and think about it in the  
12 context of an acquisition. You put your finger exactly  
13 on it by disjoining the remainder of that sentence. It  
14 seems to me it's been conflated into something more than  
15 it is. It's a product warranty, and in particular, it's  
16 a warranty against claims that are going to be made  
17 against the company. And while you could try to just  
18 truncate that first phrase, as your client has  
19 repeatedly done in this litigation, the impact of 4.19  
20 is to ensure -- in fact the entire paragraph after that  
21 first clause is to ensure that the seller is standing  
22 behind what it sold against liabilities that are brought  
23 against it. And from what I've been able to tell, there  
24 haven't been any.

25 Now, I understand that there may be some issues

1 with respect to specific clients who were affirmatively  
2 informed of issues, and to that extent there may still  
3 be a product issue. But I just think it's been made  
4 more than it is and, as is well-known, acquisition  
5 purchase agreements or asset purchase agreements are --  
6 is negotiated back and forth. Certainly that first  
7 clause is broader than you would typically see because  
8 you might have *to the seller's knowledge or qualified*  
9 *by*.

10 But if I read the paragraph as a whole, it's really  
11 not anything more than a product warranty. It's  
12 warranting the product that was sold was not outside of  
13 compliance and it's assuring that in the balance sheet  
14 itself, there is money set aside for that liability  
15 that's more than adequate. Had that not proven to be  
16 true, then I -- and maybe that's your argument. Maybe  
17 you're going to argue that it wasn't true. But I  
18 haven't heard that evidence in the case.

19 MR. MOORE: Your Honor, I think that I would  
20 characterize it differently. I disagree with what the  
21 Court has suggested that this is simply wrapped into a  
22 product warranty. The way I read it -- and I say this  
23 for a couple of reasons. Number one, this is in the  
24 warranties and rep section. It's in Article IV of the  
25 contract. That's an indemnity section that contains

1 other stuff that we've talked about here in Section X.  
2 But the contract says what it says and what I -- and I  
3 don't know necessarily what the typical contract might  
4 say, I do know what this one says and it does  
5 specifically --

6 THE COURT: Well, it's fairly easy to find  
7 language that varies in all kinds of ways in the  
8 cases --

9 MR. MOORE: Sure. But what does it mean?

10 THE COURT: -- as it arises in drafting these  
11 things. Well, I'll let you finish your thought. So the  
12 way you read this paragraph is?

13 MR. MOORE: The way I read this paragraph is  
14 that it contains more than one warranty and the first  
15 one that it contains is what I will refer to as a  
16 warranty of warranties. Let me back up for a second  
17 and --

18 THE COURT: I don't think that's helping your  
19 case, but let's go with that. Warranty of warranties.

20 MR. MOORE: Well, it says that what this  
21 company is producing meets spec is the simplest way that  
22 I would characterize the language there. It says that  
23 what's being produced by this company is good. It meets  
24 spec. What's on the labels is what's in it. What's in  
25 the certificates of analysis is what's in it. And the



1 product that is produced, the product that is produced  
2 by this company is good, which is hardly an unreasonable  
3 request to be made on the part of the buyer,  
4 particularly in light of the economic loss doctrine.  
5 That is to say what is produced by this company is going  
6 to be consistent with the way it's labeled. That is  
7 what I am suggesting. That is what I believe is the  
8 express warranty that has been made there. And that it  
9 is breached if, in fact, this is a company that's being  
10 sold under the terms of the APA that does not produce  
11 product to spec on a consistent basis. I think that's  
12 what the words of the warranty say. I think that's what  
13 it means.

14 I understand that there is additional language in  
15 the paragraph from which one might characterize as a  
16 typical proposition that we're not going to have  
17 customers coming back at us and making claims. But this  
18 says more than that. There is an indemnity clause.  
19 There is a lengthy indemnity provision in Article X of  
20 the contract that addresses the question of what happens  
21 when we get sued by customers or other third parties.

22 So I do believe that Section 4.19 does at least and  
23 in part say that this company is producing what it says  
24 it's producing. And that's the express warranty.

25 THE COURT: I'm just looking at the other -- I

1 mean reps and warranties, and they're all about limiting  
2 one's liability.

3 MR. MOORE: Right.

4 THE COURT: They're not about an assurance of  
5 -- well, I don't want to overstate it. But for the most  
6 part, they're not about an assurance of getting what you  
7 paid for, which is what I'm hearing you're now trying to  
8 read into 4.19.

9 MR. MOORE: I don't think I'm trying to read  
10 it. I think I'm looking at the actual language. I  
11 didn't draft this contract. I think all the lawyers in  
12 this room would like to take a shot at redrafting this  
13 contract.

14 THE COURT: Which is always the truth.

15 MR. MOORE: It's always the case in --

16 THE COURT: Transactional lawyers are doing the  
17 best they can under the pressures of an acquisition.

18 MR. MOORE: And I had an argument with one of  
19 my transactional partners about that very issue. But  
20 hindsight is 20/20.

21 THE COURT: I get your general point.

22 MR. MOORE: So the contract says what it says.  
23 Now, let's go to the implied provision which is just as  
24 much a part of the contract as the express provision.  
25 An implied contract of good faith. Part of the

1 contract, just like Section 4.19 or any other provision  
2 of that contract, and the problem that's been raised  
3 here is that we blew the express deadline, assuming I'm  
4 reading the contract right. We're all agreed that  
5 there's a one-year deadline that would apply to this if  
6 --

7 THE COURT: To breaches of contract.

8 MR. MOORE: Right; right. So the argument here  
9 is we blew the deadline, we missed the contractual  
10 opportunity, and that is why we're talking about good  
11 faith here. So the question then becomes why did we  
12 blow it. And we say we blew it because Malcolm Peacock  
13 breached his duty of good faith and fair dealing.

14 So how is that duty defined under these facts, the  
15 eternal struggle that's set up for us by Judge Posner?  
16 And the Court phrased it, I believe phrased it with  
17 another preliminary question what's Betco's duty?  
18 What's Betco's duty if Mr. Peacock has a duty of good  
19 faith? In the earlier good faith cases, *Schaller* out of  
20 Wisconsin, and I'll just characterize the similar  
21 language in other cases, it talks about the duty of  
22 decency, of fairness, of reasonableness in performance  
23 and enforcement. That was the case law that came to  
24 *Market Street*. And in *Market Street*, the Court  
25 struggled with that same question and talked about the

1 duty of the nonbreaching party. When it's written by  
2 Judge Posner, we talk about Judge Posner. That's the  
3 Seventh Circuit Court of Appeals. I mean this is some  
4 interesting writing by any stretch and I quoted much of  
5 it in my trial brief and I don't want to be repetitive.  
6 But I do want to point to what I believe is key in  
7 seeing how that struggle is dealt with by Judge Posner.

8 Judge Posner says "It's one thing to say that you  
9 can exploit your superior knowledge of the market. It's  
10 another thing to say that you can take deliberate  
11 advantage of an oversight by your contract partner  
12 concerning his rights under the contract." And then he  
13 uses one of the many key phrases that come out of there.  
14 He talks about sharp dealing. He says "Such taking  
15 advantage is not the exploitation of superior knowledge  
16 or the evidence of unbargained-for expense, it's sharp  
17 dealing."

18 Talks about -- further about sharp dealing. Says  
19 "The form of sharp dealing that we're discussing might  
20 or might not be actionable as fraud or deceit." Again,  
21 there's a point. Not a fraud case. Contract. This is  
22 a question of tort law and there's a rule there that  
23 applies.

24 In a contract case, Judge Posner says "Before the  
25 contract is signed, the parties confront each other with

1 a natural wariness and neither expects the other to be  
2 particularly forthcoming, therefore there's no  
3 deception. But afterwards, the situation is different.  
4 The parties are now in" -- another key phrase -- "a  
5 cooperative relationship, the costs of which will be  
6 considerably reduced by measure of trust. So each  
7 lowers his guard a bit and now silence is more apt to be  
8 deceptive."

9 And again pointing out that this is a contract  
10 case, not a tort case, he says that it doesn't rise to  
11 the level of fraud what we're talking about, and leading  
12 up to his statement about that -- I'll refer to it as  
13 the long chain between fraud and fiduciary duty.

14 He also talks about the fact that "contracts don't  
15 just allocate risk, they also for some of them set in  
16 motion a cooperative enterprise." Another phrase  
17 slightly different from the cooperative relationship.  
18 "To some extent places one party at the other's mercy.  
19 The parties to a contract are embarked on a cooperative  
20 adventure."

21 And he talks then about the office of good faith,  
22 of the doctrine of good faith, which is to "forbid the  
23 kinds of opportunistic behavior that a mutually  
24 dependent cooperative relationship might enable in the  
25 absence of rule." Says "Good faith is a compact

1 reference to an implied undertaking, not to take  
2 opportunistic advantage in a way that could not have  
3 been contemplated at the time of drafting and was  
4 therefore not resolved explicitly by the parties."

5 He says "At the formation of the contract, the  
6 parties are dealing in present realities but performance  
7 still lies in the future and as it unfolds the  
8 circumstances change. And often those circumstances are  
9 unforeseeable and the explicit terms of the contract  
10 become progressively less apt to the governance of the  
11 parties' relationship and the role of implied conditions  
12 grows." And this is --

13 THE COURT: I know that you're getting to apply  
14 this to the facts of the case, but --

15 MR. MOORE: I am.

16 THE COURT: -- you had started down this road  
17 to talk about a duty of your client.

18 MR. MOORE: Right.

19 THE COURT: But now we're still talking  
20 about --

21 MR. MOORE: I'm sorry.

22 THE COURT: If you could draw the relationship  
23 to the duty of your client, that's what I'd be  
24 interested in hearing.

25 MR. MOORE: The duty --

1 THE COURT: In this, if you will.

2 MR. MOORE: Yeah. The duty of our client is  
3 weighed, and actually it's discussed in *Market Street*.  
4 Under the facts of *Market Street*, which are at least  
5 analogous in some ways in this sense: In *Market Street*,  
6 the suggestion was that the party other than Market  
7 Street, which is referred to in that case as the -- I'm  
8 sorry, the trust I believe that Judge Posner says -- or  
9 the pension trust. That was the phrase I was searching  
10 for. And Posner, after looking at this good faith  
11 question says, you know, the fault -- he says "the fault  
12 was the pension trust's incredible attention --  
13 incredible inattention," that's the phrase he uses in  
14 the case. He thought they were incredibly inattentive.  
15 But then he went on to say "Nonetheless we" -- he said  
16 "We don't usually excuse contracting parties from  
17 failing to read and understand the contents of the  
18 contract." That's slightly different from where we are.  
19 But he says "Such enterprises make mistakes, just like  
20 the rest of us, and deliberately to take advantage of  
21 your contracting partner's mistake during the  
22 performance stage, but we're not talking about the  
23 advantage of superior knowledge at the formation stage  
24 is a breach of good faith."

25 So what he says in that case before sending that

1 case back to Judge Reynolds in the Eastern District is,  
2 you know, I know that the pension trust didn't do  
3 everything right, and in fact, it was incredibly  
4 inattentive, but that doesn't resolve the question of  
5 good faith. I'm not suggesting my client was incredibly  
6 inattentive --

7 THE COURT: Well, it's interesting you say that  
8 because I think in some ways I might disagree with you.

9 MR. MOORE: Okay.

10 THE COURT: But that's not -- you still haven't  
11 answered the question as to what obligation your client  
12 did have. Or perhaps you're saying that no matter how  
13 incredibly inattentive they may have been, there's still  
14 an obligation by the other party not to take deliberate  
15 advantage, an oversight in their rights. And I guess  
16 you're saying the oversight of their rights is they  
17 needed to do something within the first year.

18 MR. MOORE: Yes, I am.

19 THE COURT: So what is it that you contend  
20 Mr. Peacock did that took deliberate advantage of the  
21 oversight? He didn't impede your client from following  
22 up on really bright red flags. If you look at the March  
23 11 notes that were provided to your client, and this is  
24 just the first of many that continued, there's an awful  
25 lot that was called to their attention.



1 MR. MOORE: I understand.

2 THE COURT: And --

3 MR. MOORE: This is what --

4 THE COURT: It's more than incredible  
5 inattentiveness. It's not just that they didn't see it,  
6 it was -- there were flags waved in the air and we got  
7 problems here and they still didn't follow it.

8 MR. MOORE: I would disagree with that  
9 characterization. But let me assume for the moment that  
10 that's what it was or that at least it arose to the  
11 point of incredible inattentiveness. I'll assume that.

12 THE COURT: Okay.

13 MR. MOORE: The problem is that the case law  
14 that talks about this issue, and there is case law that  
15 comes after that, and I'll point to one that I'm  
16 familiar with because it came out of our office, it was  
17 called the *Uebelacker* case. It was Judge Crabb's  
18 decision in 2006. And good faith was an issue in that  
19 case. The citation is 464 F. Supp 2d 791. And in that  
20 case, Judge Crabb pointed back because the other party  
21 in the case was pointing to Schaller and suggesting that  
22 the Court had essentially said that the duty of good  
23 faith doesn't apply where the nonbreaching party has the  
24 ability to protect itself from harm. And Judge Crabb  
25 said that --

1           THE COURT: I'm not suggesting that at all.  
2 I'm not saying it doesn't apply. Clearly it applies and  
3 clearly Mr. Peacock had duties. I'm trying to ask you  
4 -- I'm trying to have you focus on specifically what it  
5 is that he did that took deliberate advantage of your  
6 client's incredibly inattentiveness to the one-year  
7 period of time that it had to act.

8           MR. MOORE: I'll proceed with that phrase in  
9 mind. What did Mr. Peacock do. The way I characterized  
10 that in the brief was he cloaked it. How did he cloak  
11 it? Cloaking has to be taken in the context of what  
12 Mr. Peacock was doing. Mr. Peacock was -- we  
13 characterize he was the president of the company. He  
14 characterized himself, if I recall correctly, as the  
15 general manager of the company. I'm not sure that makes  
16 a difference.

17           THE COURT: Well, it may make a difference  
18 legally, but practically I don't disagree with you. I  
19 mean I would assume once the company was purchased --  
20 well, it's clear hearing from both Mr. Betz and  
21 Mr. Peacock, he was running -- he was continuing to run  
22 the business at Bio-Systems. Now, we may quibble over  
23 what that meant and where his focus is, but he was still  
24 in charge.

25           MR. MOORE: Right.

1 THE COURT: Which it has a two-edge sword to it  
2 because basically he was told to just continue. I think  
3 his statements -- it keeps being emphasized he said  
4 business as usual. I didn't hear any other instruction  
5 from Mr. Betz than business as usual except let's grow  
6 sales.

7 MR. MOORE: Here's where I'm going with that  
8 question.

9 THE COURT: Yeah.

10 MR. MOORE: When we look at that chain across  
11 the courtroom of fraud versus fiduciary duty, what I'm  
12 saying is -- or whatever, chain, cord or whatever.

13 THE COURT: No, no, no. Chain is as good as  
14 any.

15 MR. MOORE: Okay.

16 THE COURT: Spectrum. Whatever we want to say.  
17 You want to say that the spectrum moved closer to fraud.

18 MR. MOORE: No.

19 THE COURT: I'm still asking you what are the  
20 acts that you believe indicate this cloaking.

21 MR. MOORE: I'm saying that the acts include a  
22 requirement of Mr. Peacock to come forward, which is the  
23 way the Court characterized that. Does Mr. Peacock --  
24 unless I misunderstood what the Court said late  
25 yesterday.

1 THE COURT: No, I asked the question whether he  
2 had a duty to come forward. So --

3 MR. MOORE: And I'm saying he does.

4 THE COURT: -- tell me what it is you think he  
5 should have come forward with.

6 MR. MOORE: He should have come forward and he  
7 should have pointed out as the manager, as the person  
8 operating this business, that we have an issue here with  
9 the boilers and here is what that issue is. He should  
10 have come forward and suggested to Betco that there's an  
11 issue here with us meeting specs. We're not meeting  
12 specs. We're consistently not meeting specs. What's on  
13 our labels and what is on our certificates of analysis  
14 is not what's being produced in this plant. And we are  
15 actually issuing certificates of analysis to customers  
16 that say that this -- and they're being made up, and I'm  
17 suggesting that he had a duty to come forward and tell  
18 it, not because he was a seller, but because he was the  
19 manager.

20 And once he -- now granted, if Mr. Peacock had just  
21 been the seller, we'd have a different issue. But he,  
22 under the contract, under the terms of the contract, he  
23 took over and was, depending on one's definition, to run  
24 the company during the next year.

25 THE COURT: No, he said in terms of the -- are

1 you talking about the APA or are you talking about the  
2 personnel contract?

3 MR. MOORE: Well, the personnel contract, which  
4 is incorporated and part of attached to the APA. And I  
5 understand we're not -- this is not an action under  
6 that, but it defines the duty that he had in the context  
7 of the APA under the APA.

8 THE COURT: This would be a really easy case if  
9 he were asked to do fiduciary duty because then I don't  
10 think there's any question that he needed to come  
11 forward.

12 MR. MOORE: That's my point.

13 THE COURT: That's where I'm -- that's where  
14 I'm struggling with your point.

15 MR. MOORE: I'm not saying that on this chain,  
16 that it slides down to the fraud end. I'm saying it  
17 slides up to the fiduciary duty.

18 THE COURT: You said he had fiduciary duties  
19 and he didn't. The one thing with Judge Posner -- the  
20 one thing that all of these cases say is he's not a  
21 fiduciary to the buyer.

22 MR. MOORE: No, but he's somewhere in between  
23 these duties.

24 THE COURT: Somewhere in between.

25 MR. MOORE: Yes.

1 THE COURT: A fiduciary would have an  
2 obligation to come forward and point out all the warts.

3 MR. MOORE: Um-hmm. That's right.

4 THE COURT: I'm not sure he has that  
5 obligation.

6 MR. MOORE: Well, what is the duty of a Keith  
7 Kennedy? Let's suppose instead of Mr. Peacock, Keith  
8 Kennedy, an outsider, comes into --

9 THE COURT: We know what Keith Kennedy did as  
10 an outsider. But, you know, I think that that pushes  
11 the law too far because that essentially says before  
12 sale, you're totally arm's length; and after sale,  
13 you're totally obligated to the employer to ferret out  
14 all problems which existed presale.

15 MR. MOORE: Not in all cases.

16 THE COURT: But in this case.

17 MR. MOORE: But in this case.

18 THE COURT: Why is this case different?

19 MR. MOORE: Because --

20 THE COURT: This case implies a duty, a  
21 fiduciary duty. And is your answer because he became an  
22 employee?

23 MR. MOORE: No, because he became a managerial  
24 employee. And there is case law that talks about the  
25 duties of employees, and I believe it is -- it depends

1 on the context --

2 THE COURT: You haven't given me that. I  
3 haven't seen that. If that was your perspective, I  
4 would have appreciated it somewhere having been provided  
5 to the Court. I'm looking in the case law for implied  
6 duty of good faith that the duty arises to a fiduciary  
7 because the person was given a position of authority  
8 after the fact.

9 MR. MOORE: I understand. I apologize if --

10 THE COURT: No, no. I didn't mean it so much  
11 as criticism as -- this is new. Until now, everyone has  
12 been citing duty of good faith case law and I think  
13 that's what you need to argue.

14 MR. MOORE: I think this is part of good faith  
15 duty of case law. That's where I'm coming from when I  
16 look at the cases subsequent. Because what -- I'm not  
17 suggesting, and in fact that's where I was going with  
18 the *Uebelacker* case is that it's irrelevant, the fact  
19 that the party might have had -- sat on their rights,  
20 for lack of a better phrase in this context.

21 What I am suggesting is that, and what *Uebelacker*  
22 made clear, that's just one factor. It depends on the  
23 other facts and circumstances. And what I'm saying here  
24 is that in this context, whether it's Malcolm Peacock or  
25 Keith Kennedy or any other person who comes in as a

1 managerial employee to any business, they must have  
2 certain duties to their employer. And whether we  
3 characterize those as fiduciary or not, those duties  
4 include I think the right to carry out your job  
5 description, which may include duties to investigate,  
6 duties to find things, duties to point things out to  
7 upper management. What makes the additional unique  
8 facts in this case is that we know what Mr. Peacock knew  
9 or at least I think we did, that's something the Court  
10 needs to find. But my view of the facts is that  
11 Mr. Peacock knew this business. He grew it. It was his  
12 business every which way. He was operating it. He was  
13 in control. And whether we have any argument about  
14 whether that was the case after the contract, we know it  
15 was the case before. So he was uniquely qualified to  
16 operate this business. He knew everything there was to  
17 know about it that anybody else -- at least I think we  
18 can say knew more about it collectively than anybody  
19 else. And I'm suggesting that at the point in time in  
20 which he became a manager, he had a duty as a manager  
21 and we have to be able to separate out the fact yes, he  
22 was the seller and he had another interest. But what  
23 *Market Street* suggests, in my view to me, is okay, now  
24 we're past pre-contract. Now let's look at the  
25 relationship that exists. At a minimum, there's a duty



1 of good faith.

2 THE COURT: And I'm trying to understand --  
3 it's an interesting argument and it sort of takes me  
4 down two different paths as the decision maker. Let's  
5 assume that he suddenly needed to take off the hat of  
6 the former manager and put on the hat for Betco, which  
7 is kind of an odd concept because if you think about it,  
8 he really just had to continue to be manager. He just  
9 had to continue. And as manager of his company for many  
10 years, he managed with an antiquated plant that was  
11 expanded over time; that was satisfying his customers to  
12 the best of his ability despite the fact that he wasn't  
13 in compliance with the specs often; and the fact that  
14 they were fudging at least by the end, we really don't  
15 know what was happening earlier, but certainly by the  
16 end he was fudging on the certificates of analysis. So  
17 that first path takes me well, he continued to do what  
18 he did, which is what he did when he owned the company,  
19 what he thought was appropriate when he owned the  
20 company. So how can that be a breach of duty of good  
21 faith?

22 MR. MOORE: He can't breach a fiduciary duty to  
23 himself is what you're suggesting.

24 THE COURT: No, I'm saying more than that. I'm  
25 saying that he -- is it right -- this gets to the other

1 esoteric question which is whether it's an objective  
2 standard. But is it right to expect an objectively  
3 reasonable person who has run his business and sold it  
4 as that business to suddenly say nope, we're going to  
5 scrap every way we went about business and now I'm going  
6 to tell Betco we need to totally retool.

7 MR. MOORE: No, I'm not suggesting he had to  
8 tell Betco that they had to retool. What he did have to  
9 tell them is, you know what? I don't know why, but  
10 these numbers aren't right. We've got something funky  
11 going on here. Because the fact of the matter is that  
12 these -- this is what we're doing with CoAs and anybody  
13 objectively, as the Court has said, has to know that if  
14 you put it in a CoA, it's got to mean something more  
15 than what Mr. Peacock said it means. That hat --

16 THE COURT: Let's assume that that's the other  
17 road then. Let's assume that he had an obligation to  
18 come forward and disclose the problems. And I agree  
19 with you that seems to me the certificates of analysis  
20 are the most egregious that were ongoing.

21 MR. MOORE: Right.

22 THE COURT: Now he disputes whether he knew  
23 about that or not, and that's a tough sell. But we'll  
24 leave that to the side for now. Then he takes on, as  
25 you suggested, the role of Mr. Kennedy. He goes in and

1 says what do we do to correct these problems.

2 MR. MOORE: I'm not suggesting necessarily that  
3 he had a duty to investigate himself like Mr. Kennedy  
4 was doing to investigate.

5 THE COURT: That is what you're saying. You're  
6 saying as a manager, he should have come in and cleaned  
7 up the shop.

8 MR. MOORE: No, no, I'm not suggesting he had  
9 to go that far. But there's a duty of candor. The duty  
10 of candor suggests that if you do nothing else, you go  
11 to management and say these CoAs are not accurate. They  
12 haven't been accurate for a long time, and I don't know  
13 why and it's not -- you know, maybe I just backed into  
14 this and I didn't intend anything bad, but we've got a  
15 problem here. I can't fix it. But you need to know  
16 about it. And you need to bring in somebody -- well,  
17 you don't even have to go that far.

18 Then management can make its own decision as to  
19 whether to bring in a Keith Kennedy or anybody else  
20 that's in a capacity to fix it. I'm not suggesting that  
21 Mr. Peacock had a duty to fix the problem that he  
22 created or didn't create. That he had --

23 THE COURT: What's the implication of that  
24 ultimately? It's not that you get part of your purchase  
25 price back. It's just that you would get the costs of

1 correcting the past problems, which is what you went  
2 about doing. And frankly, there wasn't really much cost  
3 associated that I've seen, associated with correcting  
4 past sales. The cost was going forward to develop a new  
5 system that met all of your requirements. And unless I  
6 read 4.19 that it was a breach of the proportions you're  
7 suggesting --

8 MR. MOORE: Assuming I'm wrong on 4.19. I  
9 understand.

10 THE COURT: Yeah, then the damages are really  
11 those related to correcting the past problems.

12 MR. MOORE: And I would frankly agree that  
13 that's the case. If the Court says no, 4.19 doesn't  
14 mean what I'm saying it means, then we're talking about  
15 what the cost was to control what problems we could and  
16 we'll put in evidence to that effect. I recognize that  
17 point and we look at the measure differently.

18 THE COURT: All right.

19 MR. MOORE: I do -- I'm sorry. I guess --  
20 well, I want to point out, because I don't think I  
21 completed this loop as to what happened with the *Market*  
22 *Street* case. As I indicated, and it's all published  
23 case law, but it went back to Judge Reynolds and the  
24 court there quoted one portion of Judge Posner's  
25 decision that I have not quoted yet. I believe I did in

1 the brief, and it was the phrase that -- and now I'm  
2 quoting from what the district court said -- it says "In  
3 looking back at Judge Posner's words, the court said a  
4 dispositive question in the present case is simply  
5 whether Market Street Associates tried to trick the  
6 pension trust and succeeded in doing so."

7 And then the case went back to the Seventh Circuit.  
8 Ultimately -- and you know, we can disagree as to how to  
9 look -- how things stand on the chain across the  
10 courtroom image, but ultimately the position of Betco is  
11 that Mr. Peacock tricked them and the Court is focusing  
12 or has focused in terms of asking what Betco's duty,  
13 well, how diligent did Betco have to be in finding out  
14 that they were being tricked. And the problem --

15 THE COURT: I'm going to ask you one more time  
16 and give you a chance. What is it that he did that  
17 tricked your client after sale other than, and I'm not  
18 discounting that this might be a source of liability,  
19 other than failing to come forward and disclose the  
20 problems with specs and certificates of analysis?

21 MR. MOORE: The assumption being that there is  
22 no duty to come forward, just to --

23 THE COURT: No, no. I'm saying -- forget the  
24 assumption. Is there anything else that you want me to  
25 focus on that you believe he did other than coming

1 forward?

2 MR. MOORE: Well, my struggle quite frankly  
3 here is that I know this is not an economic loss  
4 doctrine fraud. We've got all those issues. But we  
5 have pointed here to things that happened before and I  
6 would suggest they are appropriate at least to give  
7 context.

8 What is that context? The context is the  
9 certificates of analysis. The context is a seller who  
10 told a buyer that we test all our products.

11 THE COURT: Let me be a little bit more  
12 specific. I've heard evidence that on the production  
13 side Mr. Peacock was overbearing, was specific in  
14 direction as to who should talk to Betco through the  
15 chain of command. But on the spec and certificate of  
16 analysis side, nobody said they weren't allowed to talk  
17 to the Betco people. In fact, they were talking to them  
18 regularly.

19 So I didn't hear any testimony on the side that  
20 you're focusing on, which is the problem with the specs  
21 and the problem with the certificate of analysis,  
22 whether it's sales or the lab, that they were being told  
23 by Mr. Peacock you can't talk to Betco.

24 MR. MOORE: So the Court asked me what -- I  
25 might mischaracterize, but what Mr. Peacock did to hide

1 the ball, what he did that was deceptive.

2 THE COURT: What he did that was a trick, yeah.  
3 How did he try to trick them.

4 MR. MOORE: And the point that the Court raised  
5 had to do with whether or not the employees were free or  
6 not to go to Betco and tell what they knew, implying  
7 that the trick of Mr. Peacock was to try to prevent that  
8 from happening.

9 THE COURT: I'm asking you.

10 MR. MOORE: I understand.

11 THE COURT: I'm not trying to tell you. That  
12 seemed to be a theme that was coming through the  
13 witnesses.

14 MR. MOORE: And this is where I'm struggling in  
15 attempting to isolate this, as I believe I need to at  
16 least try to do from pre-contract formation because I  
17 believe that provides the context. The context in which  
18 we came into this is that Betco thought product was  
19 being made to spec and that it was being tested and they  
20 had good reason to believe that. And the trick -- and I  
21 guess the suggestion is the trick needs to be some sort  
22 of affirmative post-contract action and if that's what  
23 the Court is suggesting. And I do have difficulty  
24 suggesting that there's some affirmative action. Well,  
25 I would say yes, I believe he was managing the company.

1 He was attempting to prevent Betco people from coming in  
2 and learning things. He breaks up the meeting that was  
3 occurring. He tells people to communicate through him.

4 So if the affirmative act that we're looking for  
5 there is hiding the ball, yes, that is where I'm coming  
6 from. But I am --

7 THE COURT: All of that is on the production  
8 side, not on the side that you're focusing on in terms  
9 of what he should have come forward and talked about,  
10 which is the failure to perform regular testing of the  
11 batches and putting specs on when they're really not  
12 sure, or the more egregious failure to do actual testing  
13 and putting the correct numbers on the certificates of  
14 authority. That's on the side of the company where he  
15 really didn't affirmatively suppress.

16 MR. MOORE: Where he didn't affirmative?

17 THE COURT: Suppress disclosure except, I  
18 guess, by the theory by dint of personality no one felt  
19 free to say anything.

20 MR. MOORE: Yeah. I mean on -- there is a  
21 context that we've attempted to put forth in which the  
22 Court needs to see these facts, which is where I'm  
23 coming from on the argument of the duty to come forward.  
24 So if the suggestion is that there needs to be an  
25 affirmative act that is a trick, I don't know that I can



1 say that outside that context, both the pre-contract and  
2 the post-contract context. I'm suggesting that  
3 Mr. Peacock knew what was going on and that he had to  
4 know that Betco would at least be interested in that  
5 fact in that he carried out no -- what I believe was an  
6 affirmative duty to bring that forth. That is a form of  
7 a trick and I believe it is a trick and I believe that  
8 in the context of pre-contract and post-contract, that  
9 there was a trick going on. That was the way that I  
10 heard the evidence. The Court might have heard it  
11 differently.

12 But I don't believe I ultimately am suggesting to  
13 the Court that Mr. Peacock was not acting in good faith.  
14 He was not acting in good faith. And that is a trick.  
15 That is a form of trick. And we can get caught up in  
16 the semantics of what Judge Posner was using, but I  
17 believe the trick is important in its own context as  
18 well as in the context of the *Market Street* discussion  
19 and the post-*Market Street* discussion that says yeah,  
20 you can say that you've got to pay attention, buyer.  
21 You can say that you can be incredibly inattentive or  
22 that you are incredibly inattentive, but that does not  
23 dispose of or wrap up or complete the duties that the  
24 seller has under the covenant of good faith and fair  
25 dealing. And that is particularly so under these

1 circumstances when you move the duties that he  
2 undertakes that far to that end of the courtroom, as  
3 I've suggested. So that is my argument.

4 THE COURT: I'm going to stop you there.

5 MR. MOORE: Sure.

6 THE COURT: You have the burden of proof, so  
7 I'm going to allow a short rebuttal. Mr. Jackson or you  
8 are welcome to at the close of the argument by the  
9 defendant. We'll hear next from the defendant.

10 MR. MOORE: Thank you, Your Honor. (9:23 a.m.)

11 MR. BIANCHI: Morning, Your Honor.

12 THE COURT: Morning.

13 MR. BIANCHI: In listening to Betco's opening,  
14 one of the questions that you posed is what was their  
15 duty. What was Betco's duty in this. And I think that  
16 Wisconsin Jury Instruction 3044 lays out the duty and  
17 that's it is not a breach of the duty of good faith if a  
18 course of action available to plaintiff could have  
19 avoided the harm and this course was not followed. And  
20 I think you've -- in the discussion it was pointed out  
21 very clearly that there was a course of action that  
22 Betco could have taken. It bargained for a full-year  
23 warranty on the company, and during that year it decided  
24 that it wasn't going to do any actual look at the  
25 company. There were many red flags that were raised by

1 personnel at Bio-Systems. We heard testimony on that.

2       And then I think the red flag for Mr. Peacock was  
3 that Betco for some reason, which we don't know, chose  
4 not to share those things with him. And I'm not saying  
5 they had a duty to share them with him and try and work  
6 through it, but I do believe that they had a duty under  
7 the contract to assert a claim for all of those. They  
8 could have come right out to him and said we're claiming  
9 that these problems right here, these are all breaches  
10 of your warranty. These are all breaches of  
11 representations that you made to us. And the contract  
12 permitted those to go past the one year then once they  
13 were raised.

14       As soon as they are raised, the statutes of  
15 limitations, it says in Section X that they can continue  
16 to go on. And, in fact, Mr. Peacock bargained for  
17 something in that same situation and that was the 2.7  
18 million cap.

19       So again, I know that Betco mentioned context and I  
20 absolutely think that's true. We have to look at this  
21 duty in the context of the contract that was agreed to  
22 between the parties. And the context that they're  
23 presenting I believe is wrong. It's the context of more  
24 of a tort of fraud. Betco certainly said that this is a  
25 contract situation, but there was very little discussion

1 of how the contract fits into this contextually and I  
2 think that it's important that in Section 10 there were  
3 those provisions and that's what Betco's duty was. They  
4 didn't have to come and bring it forward and talk to him  
5 about it, but they at least had to state that claim and  
6 say here's the problem. And in fact, they were put on  
7 notice. Mr. Lyons testified that when Mr. Peacock  
8 approached him about the discount, he talked to Mr. Betz  
9 and said have you seen any problems, any reason why we  
10 shouldn't pay this money out? And Mr. Betz's response  
11 was no.

12 Now, why Mr. Lyons didn't ask Mr. Bischoff, why he  
13 didn't ask the people that visited the plant multiple  
14 times we don't know. They didn't explain why that  
15 didn't work out. But they were certainly on notice.

16 THE COURT: Let me get to the part that I don't  
17 think they were on notice for. The certificates -- I  
18 never get this right.

19 MR. BIANCHI: Analysis.

20 THE COURT: Analysis. Certificate of analysis.  
21 Have a certificate of value and it never fits with the  
22 "a." The certificate of analysis. I didn't see  
23 anywhere that that's a red flag; that that was something  
24 that Betco was aware.

25 MR. BIANCHI: I agree that that wasn't

1 specifically raised to them. But I do think that the  
2 evidence certainly shows that they had complete access  
3 to all the information that was going on, and not only  
4 complete access to it, but they were encouraged to come  
5 and be a part of the plan. They could come and talk to  
6 Dana Juul all the time; ask her how's the process? How  
7 does this work? How do we start the whole process?

8       Your Honor, I believe that when they bought the  
9 company, they could have come in, they could have set  
10 someone in the beginning part here is where the  
11 fermentation happens, and follow the process all the way  
12 through. And they had one year to do that to see how  
13 everything worked out. And so I still think that that's  
14 part of their duty to be able to take a course of  
15 action. The course of action --

16       THE COURT: The problem I have with that is I  
17 don't know why it would have occurred to them that a lab  
18 wasn't actually doing the testing required for a  
19 certificate of analysis. So I don't know how you even  
20 formulate the question.

21       Now, I suppose if you did a real true diligence  
22 after you bought the company, maybe that's what you're  
23 suggesting they were obligated to do, you might get to  
24 the point that that was a failing on Betco's part. But  
25 the most difficult part about Mr. Peacock's testimony

1 was his testimony that a certificate of analysis didn't  
2 mean what everyone else, including his own expert, says  
3 it means.

4 I'm just struggling with how to address that in the  
5 context of a duty of good faith and fair dealing.

6 MR. BIANCHI: Well, I think one of the points  
7 to look at is that in the Marketplace (sic) case, it  
8 was, as I know you know, it was on summary judgment and,  
9 one of the things that Mr. Posner pointed out was was  
10 there -- this needs to go to a jury because it needs to  
11 be decided whether --

12 THE COURT: It's not Mr. Posner, he's a judge.

13 MR. BIANCHI: Judge Posner.

14 THE COURT: In case he's ever reading this  
15 transcript.

16 MR. BIANCHI: That's scary to think.

17 THE COURT: Could be Professor Posner. I guess  
18 he wouldn't mind that.

19 MR. BIANCHI: But I think one of the things  
20 that he looks at is, right, was there a trick and  
21 deceit. Your Honor questioned Mr. Peacock and he was  
22 very honest with what he thought about it. There was no  
23 deceit. There was no trick. And in fact, the people  
24 who testified, Mrs. Juul, Mr. Gerson, they were doing  
25 it. They didn't believe there was any trick or deceit

1 with it as well. There was no trick or deceit here, and  
2 that's what I think is --

3 THE COURT: Are you saying no trick or deceit  
4 on the part of the sale to the customer?

5 MR. BIANCHI: No trick or deceit on the part of  
6 the certificates of analysis. That's -- I think that to  
7 breach the duty of good faith, as has been pointed out,  
8 there has -- the state of mind of the person who was  
9 trying to trick is important. In the *Market* --

10 THE COURT: That's not true. The state of mind  
11 of the individual -- Mr. Peacock's state of mind is not  
12 important. He's subject, unless I'm misreading the  
13 cases, to an objective test which is what would a  
14 reasonable person do. What would they have to do to  
15 meet the duty of good faith.

16 MR. BIANCHI: I mean I think that Judge Posner  
17 thinks or Judge Posner at least talks about that. In  
18 the case of Marketplace (sic), what he says "The  
19 district judge jumped the gun in choosing between  
20 alternative characterizations." He's referring to --

21 THE COURT: Understood.

22 MR. BIANCHI: -- summary judgment. "The  
23 essential issue bearing on Market Street Associates'  
24 good faith was Orenstein's state of mind, a type of  
25 inquiry that ordinarily cannot be concluded on summary

1 judgment and could not be here. If Orenstein believed  
2 that Erb knew or would surely find out about paragraph  
3 34, it was not dishonest or opportunistic to fail to  
4 flag that paragraph, or even to fail to mention the  
5 lease, in the correspondence and rare conversation with  
6 Erb, especially given the uninterest in dealing with  
7 Market Street Associates that Erb fairly radiated. To  
8 decide what Orenstein believed, a trial was necessary."

9       Whether it's objective or not, I think that's an  
10 important consideration because I think the objective  
11 person would have to look at it. Did the person  
12 objectively -- were they believing that what they were  
13 doing was wrong and they were trying to create some kind  
14 of trick here?

15       I think what Betco is certainly arguing is for a  
16 fiduciary duty; that he had some, you know, much bigger  
17 duty than what the duty of good faith and fairly dealing  
18 is here. I mean if they wanted to bring a claim that he  
19 breached his employment contract and violated some  
20 fiduciary duty, that certainly could have been brought.  
21 That's not what we're dealing with here. We're dealing  
22 with the duty of good faith within this -- within the  
23 APA and I think it needs to be tied to that.

24       THE COURT: What about the fact that the APA  
25 incorporates or refers to the personnel or the



1 employment agreement?

2 MR. BIANCHI: I agree that it incorporates it,  
3 but you would have to bring a breach of that contract.  
4 I think otherwise they are not separate contracts.

5 THE COURT: But they might inform what the duty  
6 of good faith and fair dealing is in the context of  
7 those.

8 MR. BIANCHI: I would argue that it's separate.  
9 No, that it doesn't do that. That that's a separate  
10 claim and it's a separate issue.

11 One of the other points about the certificates of  
12 analysis is I do think it was interesting we did not  
13 hear from a single customer about what they expected  
14 when they got a certificate of analysis. It may very  
15 well may be, Your Honor, that customers, there's just  
16 looking for a minimum. They continue to come back to  
17 Mr. Peacock. Because one of the questions that I think  
18 is still left on the table, and you pointed it out last  
19 night, when a customer would get a product, if that  
20 wasn't what was actually there, wouldn't there be a  
21 complaint or a problem or something being raised? And  
22 there's just zero evidence of that happening. Zero.

23 THE COURT: Maybe the customer foolishly  
24 believed that he was getting what the certificate of  
25 analysis said he was getting or she.

1           MR. BIANCHI: Certainly I think it could be  
2 possible. We're talking hundreds of customers over 20  
3 years and there's not a single piece of evidence that  
4 would suggest that with the certificates of analysis  
5 having to, you know, set forth exactly the amount that  
6 was being there.

7           Your Honor, that also brings to the next point  
8 which is, as you said, the injury; that even if we could  
9 find some level of breach here, which I absolutely don't  
10 think that there is, because again, Betco could have  
11 taken action to find out all this information, including  
12 the certificate of analysis. All they needed to do was  
13 sit one day in the office and say how do you fill these  
14 out. And not because there was any concern. Again, I'm  
15 not saying that they would have known that something  
16 potentially wrong was going on because nobody thought  
17 that there was anything wrong there or in any of the  
18 other things that were going on in the plant. They just  
19 needed to be a part of it and I believe that that was  
20 their duty in entering the contract, the APA with  
21 Mr. Peacock. They had to keep up their end of the  
22 bargain as well, and they chose not to. They didn't  
23 raise those -- any issues with him that they're now  
24 bringing forward to the Court.

25           And so as far as the causation or the injury

1 argument, Betco claims that Mr. Peacock breached his  
2 duty of good faith and that it caused them some harm,  
3 but we did not again see any evidence of the harm that  
4 that would cause. Especially with the certificates of  
5 analysis, we didn't see a single customer complaint,  
6 lost customer. And there's nothing again that's tied  
7 into the contract of we read Section 4.19 the same. I  
8 believe, Your Honor, that it's a liability, and everyone  
9 testified there was no liability that's been raised.

10 THE COURT: That's not entirely true.  
11 Mr. Kennedy did talk about going back to individual  
12 customers. It's not clear, and I didn't accept it as an  
13 exhibit because it's not clear what part is hearsay from  
14 customers and what part is summary of what he did. But  
15 I couldn't -- there certainly seemed to be a suggestion  
16 that there were some negotiations with clients. Now  
17 they could have been all prospective, which is what it  
18 appeared to be; that is to say either we improve the  
19 process and we charge you more or we improve the process  
20 or we don't charge you more or you walk away as a  
21 customer. I suppose walking away as a customer could  
22 have its own intended cost. So it's not entirely true  
23 there isn't evidence of customer issues.

24 MR. BIANCHI: Well, and my response to that  
25 would be that it's all hearsay. There is no -- there's

1 no invoice that shows any change in price; no -- we have  
2 you noted there have been way more exhibits than you  
3 expected, plenty of emails. Not a single email of a  
4 customer. And in fact, in the deposition designations,  
5 if you look at the customers that are there and compare  
6 some of them to the list, you'll see that there's  
7 overlap and that those customers that are noted in the  
8 list as having some kind of problem said no, no, no  
9 problems on our end. We don't know what's going on.  
10 And I think that it's very telling why there isn't any  
11 customer information from Betco, because there wasn't a  
12 problem. There just wasn't.

13 People did not have a problem with the product that  
14 they were receiving. And so because of that, I believe  
15 that there's certainly not the preponderance of the  
16 evidence being satisfied that Betco has suffered any  
17 injury from any potential breach.

18 And I think certainly on the boiler issue, that  
19 that can't be a breach. I think that that was raised,  
20 and not only was it raised, it was something they  
21 decided to do and started doing before the year was up  
22 and they certainly could have said no, we want you to  
23 indemnify us for this.

24 And the same thing with the things being shipped  
25 under spec. There was lots of information where they

1 were completely aware that it was being shipped, Your  
2 Honor.

3 So the only thing that would be left would be the  
4 certificate --

5 THE COURT: Go ahead. The only thing that  
6 would be left would be the certificate of analysis.

7 MR. BIANCHI: Yes.

8 THE COURT: What about this notion that specs  
9 were being put on bags without any testing actually  
10 being done?

11 MR. BIANCHI: I do not remember hearing any  
12 testimony that said that specific -- what specific  
13 products were not going out without any testing. My  
14 recollection was that there was this -- the theoretical  
15 count, which was this IP that was tested and then they  
16 were mixed and so there was no final test. And that was  
17 the problem.

18 THE COURT: In other words, the intermediate  
19 tests that were relied on by extrapolation. I agree.

20 MR. BIANCHI: Right.

21 THE COURT: I guess there were a number of  
22 categories -- I had understood there were a number of  
23 products that went out with specs in which no test was  
24 done at all. You're saying that that's not your  
25 recollection.

1           MR. BIANCHI: That's not my recollection. And  
2 I think the other thing is there was hundreds of  
3 products, so what I think is also difficult here is  
4 knowing what product goes with what. Like we have all  
5 these -- well, there are certificates of analysis and we  
6 had a guesstimation that maybe 30 percent of the  
7 products could have gone out with certificates of  
8 analysis, and not every time. So there was nothing  
9 tieing the evidence together to be able to say here's  
10 actually what happened. So that even if somehow there  
11 was some level of a breach there, again, where the  
12 injury would come I think is nonexistent.

13           But even that, Your Honor, I think that's again  
14 subsumed in knowing that product was under spec and it  
15 was going out to customers at the same time. That's  
16 something that's in that same area that obviously  
17 something is wrong with the product area. And so we  
18 need to go take a look at it.

19           THE COURT: The other problem I have is that  
20 it's clear that your client has a motivation. Whether  
21 he acted on it or not is part of what I have to decide.  
22 But he clearly had a motivation to tamp down any  
23 discovery of need for substantial change. Because he's  
24 a bright man; he knows if nothing comes out during the  
25 first year, he's free and clear on breach of contract.

1 And if nothing comes out in two years, although he  
2 wasn't allowed to stay long enough to do that, that all  
3 claims are going to be lost. It's hard not to think  
4 about that motivation when you consider the way he  
5 behaved at least toward the production side of the  
6 company. Saying something as cruel as these people  
7 don't know anything suggests a real effort to suppress  
8 interaction and discussion.

9 Now, the response to that in part is by March of  
10 2011, those same people had already conveyed most of  
11 their concerns and so I'm not sure it gets him  
12 completely off the hook. To the extent he was  
13 affirmatively acting in a dictatorial way or controlling  
14 way, and it undermines certainly his notion that he was  
15 just out there dealing with sales if he's affirmatively  
16 barging into production meetings and telling Betco  
17 representatives not to talk to these people, there's  
18 something going on here that I'm troubled by and that  
19 may result in a breach of fiduciary duty. I'm not sure  
20 where the injury fits, but it's troubling conduct.

21 MR. BIANCHI: I think there's a couple things  
22 with the example even that you give. If you'll recall,  
23 Mr. Loverich did not remember what the conversation was  
24 about.

25 THE COURT: No, no, I'm not assuming that -- it

1 doesn't matter. I mean he barged in and stopped the  
2 conversation. So he didn't know what the conversation  
3 was about.

4 MR. BIANCHI: Except I think there's an  
5 important point and that's that Chris Pavain was a  
6 salesperson and that those two gentlemen were  
7 production. So from our perspective, I understand that  
8 this is -- the evidence is, you know, they're disputing  
9 it, was that from Mr. Peacock's perspective when he saw  
10 that, he saw production people talking to someone in the  
11 sales department that wouldn't have the answers for the  
12 questions was his position. So when he walks in and  
13 says why are you talking to them, they're not going to  
14 know anything that you want to know, Mr. Pavain. That's  
15 our view of that situation.

16 THE COURT: Was Mr. Pavain the only one present  
17 at that meeting and that was something I missed? Was he  
18 the only one present for Betco?

19 MR. BIANCHI: Yes, Your Honor. And if you  
20 notice, the visits from the production people, the  
21 technical people in March, Mr. Pavain is not listed  
22 there because he wasn't part of that group. That was  
23 Mr. Bischoff, Mr. Henson, I think Mr. -- I forget  
24 Brett's last name.

25 MS. TURKE: Hanus.



1 MR. BIANCHI: Hanus. Thank you.

2 THE COURT: That's fine.

3 MR. BIANCHI: So I think in that circumstance  
4 that's what was -- what he was seeing what was going on  
5 there. And I think we showed plenty of the back and  
6 forth emails. And even they tried to put it off that he  
7 didn't think Mr. Stratton -- Neil knew what he was doing  
8 and he didn't want to give him any information. Then we  
9 saw emails where he would say well, what does Neil think  
10 about this? And this was late in the summer of 2011  
11 where he's asking Neil's opinions on things.

12 So I just think that it was not true that he just  
13 totally discounted what Mr. Stratton said. I think it  
14 had a lot more to do with there was a production and the  
15 thing that he had been doing for 25 years, not saying  
16 that it was all right, but when you do something for 25  
17 years and you're well practiced and you're older, in my  
18 experience being younger I often get told you don't know  
19 what you're talking about and then it's on me to try and  
20 prove to someone else that maybe I do know what I'm  
21 talking about and these are important points. And I  
22 think that that's a lot of what was going on between  
23 Mr. Loverich and Mr. Stratton and Mr. Peacock. You had  
24 someone who had a way of doing things and believed that  
25 the way that they were doing it was right and wanted to

1 because that's the company that they had run and had  
2 created. And then you had new younger guys who  
3 presumably don't have experience with what you're doing  
4 coming in and telling you this is what you need to  
5 change. And I think in your mind, if it were me, I'd be  
6 like why am I going to listen to you? Why do you know  
7 what you're talking about?

8 So that would be our take on those kind of  
9 interactions. But again, nothing was being hidden from  
10 Betco there. And that meeting that took place, it took  
11 place in, they said some time they thought in late  
12 September 2011. The year was over anyways at that  
13 point, if we want to get technical. They had a year  
14 from the purchase, which was September 29, 2010.

15 THE COURT: September of 2010.

16 MR. BIANCHI: So even though Mr. Peacock was  
17 there until November, and we certainly talked about that  
18 time frame, the time for them to bring their claim was  
19 up.

20 THE COURT: Well to bring their breach of  
21 contract claim.

22 MR. BIANCHI: Correct. Correct.

23 THE COURT: Anything more then for the  
24 defendant?

25 MR. BIANCHI: The last point that I would make

1 about the duty of good faith and fair dealing that Judge  
2 Posner notes in his opinion and several others in the  
3 Seventh Circuit is that it is often used to insert  
4 provisions into the contract that addressed situations  
5 that the parties couldn't and didn't think to address at  
6 the time. And what we see Betco was trying to do is put  
7 in an extra provision in the contract that says well, we  
8 should have extended the warranty period longer.

9 Whereas in this circumstance no additional provision is  
10 needed. The contract provides that they had that time  
11 to be able to bring their breach of warranty claims or  
12 misrepresentation claims and within that year period,  
13 the duty was on them to take that course of action. The  
14 parties had bargained. The risk was there. They were,  
15 you know, obviously a sophisticated party and had that  
16 opportunity to do that, and so we would ask that the  
17 Court would find that Mr. Peacock did not breach his  
18 duty of good faith and fair dealing. (9:44 a.m.)

19 THE COURT: And I'll hear then rebuttal from --

20 MR. MOORE: Can't help it, Your Honor.

21 THE COURT: No, no. That's fine. I  
22 anticipated it.

23 MR. MOORE: I hope it's clear that one of the  
24 frustrations of attempting to respond here and to  
25 respond in general is that we start out talking about

1 the duty of good faith and all of a sudden we're talking  
2 about Betco's duty. And I understand that what Betco  
3 was supposed to do has been characterized as a duty, but  
4 the primary focus here and the primary -- well, the  
5 primary focus of *Market Street* is that you really do  
6 need to look at the duty of, in this case the seller,  
7 and then you might consider issues, including the  
8 incredible inattentiveness of the other party. But  
9 we're really focusing on the good faith of Mr. Peacock,  
10 not focusing primarily on Betco simply because Betco has  
11 the burden of proof.

12 It's interesting that when we begin to talk about  
13 it in that term, now all of a sudden we're going to talk  
14 about the fraud case that at the defendants' request has  
15 been thrown out as the Court has correctly pointed out.  
16 No, this is a contract duty. We do not -- if there's a  
17 duty of due diligence, that applied to pre-contract  
18 behavior, and we can use whatever characterization we  
19 like with regard to the supposed duty on the part of  
20 Betco post-contract, but it's not due diligence.

21 Now, I also want to point out that there's one  
22 point I neglected to mention with regard to the trick  
23 when the Court quite appropriately asked me what's the  
24 trick and that is the testimony that I heard and  
25 understood was that Mr. Peacock was essentially telling

1 the employees to lie about the boilers to Betco. The  
2 reason for the boilers were needed, suggesting we need  
3 the boilers in order to produce the product that Betco  
4 wants, when, in fact, there was a problem with the  
5 boilers that was inherent to the operation. That was  
6 not only deceitful conduct, that was intentionally  
7 misstating, directing employees to misstate the facts to  
8 Betco as I heard and understood the testimony.

9 THE COURT: That's not entirely true. He was  
10 telling them to emphasize one part --

11 MR. MOORE: Right.

12 THE COURT: -- which was one of the reasons why  
13 they needed new boilers. In any event, the boilers is  
14 the part of this case that probably has the least  
15 likelihood of going forward since it was clearly  
16 something known by your client --

17 MR. MOORE: I understand.

18 THE COURT: -- early on.

19 MR. MOORE: In any case, Your Honor, I wanted  
20 to point out in response to the question because it was  
21 something that was brought up.

22 THE COURT: Understood.

23 MR. MOORE: The question of Mr. Peacock's  
24 knowledge and intent, I think the Court raised,  
25 correctly stated that intent is not an element in this

1 case and I want to point the Court to that same jury  
2 instruction that counsel was referring to, Wisconsin  
3 Jury Instruction Civil 3044, and the comments on that.  
4 The comments include the fact, and I'll quote it, says  
5 "generally scienter is not an element of a contract  
6 action. Failure to perform a contract need not be  
7 willful or negligent to constitute a breach." And  
8 that's the comment on the good faith instruction.

9 Counsel also referred to *Market Street* and the name  
10 of the individual is Orenstein. I want to point out  
11 that Orenstein, in the *Market Street* case, was the  
12 individual who was representing the trust, the other  
13 party. And it was Orenstein's conduct that was being  
14 referred to by Posner in that case when he talked about  
15 incredible inattentiveness. He was saying that  
16 Mr. Orenstein was incredibly inattentive, but  
17 nonetheless that's not the question we're dealing with.  
18 The question is whether there's a breach in the duty of  
19 good faith and I'm going to send this back to the  
20 Eastern District, which again ultimately found that  
21 despite Mr. Orenstein's inattentiveness, that Market  
22 Street had tricked the other side.

23 I understand the discussion about Mr. Kennedy's  
24 testimony with regard to what was done with customers  
25 and I would simply point out to the Court the difficulty

1 of bringing in -- putting on the stand our own customers  
2 to testify as to why they might have had problems, both  
3 with regard to the volume and whether it's a good idea  
4 to bring in your customers and talk about the problems  
5 they've had with us. So that was at least problematic.

6 THE COURT: On the other hand, Kennedy had gone  
7 back and talked to customers about these issues. So  
8 it's not like he was put in a position of not  
9 understanding.

10 MR. MOORE: No.

11 THE COURT: Is there a case where there has  
12 been an issue with the customer on past purchases? In  
13 other words, were they -- I guess there was some  
14 testimony, isolated testimony about testing not  
15 comporting. I didn't hear that specifically with  
16 respect to a certificate of analysis.

17 MR. MOORE: Is there a problem with past  
18 customers?

19 THE COURT: Yeah.

20 MR. MOORE: Yes. I can't point you to the  
21 evidence, specific evidence at this point, but I know  
22 from what I know about this case --

23 THE COURT: There were isolated instances of  
24 customers not raising getting -- raising a concern that  
25 they weren't getting what they had bought. That

1 testimony came in.

2 MR. MOORE: Yes.

3 THE COURT: What I'm talking about is had there  
4 been payouts by Betco for customers not getting what  
5 they bought for products sold before acquisition,  
6 post-acquisition where there had to be payouts.

7 MR. MOORE: I'm not aware of any payouts to  
8 customers post-acquisition. No, I'm not.

9 THE COURT: Understood.

10 MR. MOORE: As the Court has suggested, the  
11 problem here -- the defense is well, people didn't know  
12 that they weren't getting product. They didn't know.  
13 Well, the fact of the matter is and one of the natures  
14 that we've learned about in this industry is no one is  
15 suggesting here that this bacteria doesn't work and the  
16 question is to what extent and how sophisticated a  
17 customer do you have to be to know that you're getting 2  
18 billion instead of 5 billion. When you put bacteria, as  
19 the Court took judicial notice, when you put bacteria in  
20 a bucket it will grow, and that's true of septic systems  
21 and municipal waste systems. So ultimately there may be  
22 5 billion there. It's a question of how much time it  
23 takes and that's the subtlety of this interesting little  
24 exercise.

25 The fact of the matter is though that when a



1 customer asks for, it receives, and as happens in  
2 foreign countries at least and in many sophisticated  
3 municipalities say I want to see -- or municipalities in  
4 general, that we want a certificate of analysis that  
5 certifies what we're getting is what you're  
6 representing, they're entitled to rely on that. They  
7 may never know they're being cheated, but that doesn't  
8 mean they're not being cheated.

9       If we were going to argue here as to whether or not  
10 Mr. Peacock hid something from Betco, the fact that he  
11 hid it from customers is virtually indisputable I think.  
12 If we didn't know, they didn't know. It is a fact,  
13 contrary to what I believe was being represented here,  
14 that products were going out the door without testing.  
15 Ms. Walters testified to that. I know specifically as  
16 to liquid products after 2007. Product was going out  
17 the door. It was not being tested.

18       I guess I'll conclude by suggesting that if we're  
19 going to talk about what gets inserted into this  
20 contract, whether it's next to Section 4.19 or in some  
21 other place, what we're going to insert here and what we  
22 wish we would have inserted, to use the language from  
23 *Market Street* that counsel was correctly referring to, I  
24 guess the suggestion is that what we would have inserted  
25 if we had thought about it and if we could do it over

1 again with 20/20 hindsight, we would have inserted  
2 something at least that said "and you, seller, won't  
3 hide the ball from us. That you will give us a clean  
4 look at what we thought we were getting so that that  
5 one-year provision, we could reasonably take advantage  
6 of it. That we could get a good look at this."

7 I understand the Court's statements or the Court's  
8 suggestion that well, you didn't do a very good job  
9 about that. You were perhaps incredibly inattentive.  
10 But the fact of the matter is if Malcolm Peacock hadn't  
11 been there, we believe this would have turned out  
12 differently. I recognize that's not the test here, but  
13 if we're going to talk about what we would have  
14 inserted, what hindsight would have allowed us to do,  
15 that's what our hindsight, as we sit here, as we've sat  
16 here and heard the evidence, that's what we would  
17 insert. Give us a chance to take a real look at this  
18 operation and this product, not pre-petition or not  
19 pre-contract, I understand that, but post-contract.  
20 Thank you.

21 THE COURT: Thank you very much, Counsel. I am  
22 going to take about a half hour. I'd ask the parties to  
23 be back at 10:30 and I will give you guidance on  
24 liability and what, if anything, I'll hear as to  
25 damages. If we have to line up witnesses consistent

1 with their availability, we can talk about that as well,  
2 though my expectation would be that we would proceed  
3 with witnesses for the plaintiff on the issues that I  
4 identify, assuming I do, and I'm frankly still puzzling  
5 about one aspect. And that we could proceed almost  
6 immediately with that.

7 Anything more for the plaintiff before I take this  
8 under advisement?

9 MR. MOORE: No, Your Honor.

10 THE COURT: Anything for the defendant?

11 MS. TURKE: Your Honor, just wanted to talk  
12 about briefly our damage expert. He is available by  
13 telephone. He has to testify in another matter.

14 MR. BIANCHI: We have until I think one --

15 MS. TURKE: One o'clock central time for him to  
16 testify.

17 THE COURT: I'm sorry, you have until then or  
18 he would be available?

19 MS. TURKE: He would be available until one  
20 o'clock central time.

21 THE COURT: All right. I guess we can go  
22 forward. How long do you think your witness will take?

23 MR. JACKSON: Not long, Your Honor.

24 THE COURT: All right. Then perhaps we'll be  
25 able to complete it all within that time frame. I have

1 a 12:30 hearing, I believe. It might be -- actually it  
2 might be -- that's yesterday's -- I will work around it.  
3 If we have to, we'll postpone that one for a half hour.

4 Very good. Thank you all. We're in recess and  
5 will reconvene at 10:30.

6 (Recess 9:58-10:39 a.m.)

7 THE COURT: I should begin by saying that I  
8 appreciated the presentations by both sides. This has  
9 been a very interesting case well before we got to  
10 trial. It raises some very interesting disputed  
11 positions. I often told my clients when I was in  
12 private practice that an interesting case is a wonderful  
13 thing for lawyers. It's not good news for clients  
14 because it tends to make it expensive, involved, and  
15 result, as this case did, in trial. So I don't mean to  
16 suggest that's any comfort to the parties. I understand  
17 that as interesting as the issues are, this has been a  
18 difficult process, but I have appreciated how it's been  
19 presented by both sides and I wanted to say that at the  
20 outset.

21 In terms of deciding the remaining issue before me,  
22 the implied duty of good faith in performance of the  
23 contract, I start with the law. As the trier of fact  
24 I'm bound by the law, just as the jury is. And whatever  
25 the nuances may be, that law is set forth at Wisconsin

1 Jury Instruction Civil 3044, which I will now set forth  
2 for the record. Under Wisconsin law, the contract  
3 between defendant and plaintiff requires that each party  
4 act in good faith towards the other party and deal  
5 fairly with that party when performing the express terms  
6 of the contract. This requirement to act in good faith  
7 is a part of the contract just as though the contract  
8 stated it.

9 In this case, the plaintiff claims defendant had an  
10 obligation to use good faith when performing his duties  
11 as the ongoing manager of his former company  
12 Bio-Systems, including disclosing information that  
13 plaintiff needed to know to exercise rights under  
14 Section 414 and Chapter 10 or Section 10 -- should be  
15 Section 4.14 and Section 10 of the contract.

16 As to this obligation -- excuse me. As to this  
17 obligation, plaintiff claims that defendant breached the  
18 contract's good faith obligation by failing to disclose  
19 problems with boilers, production processes, test -- and  
20 testing of product before shipping, as well as  
21 suppressing plaintiff's disclosures -- I'm sorry,  
22 plaintiff's discovery of these problems. Whether the  
23 duty to act in good faith has been met in this case  
24 should be determined by deciding what the contractual  
25 expectations of the parties were. Therefore, in

1 deciding whether the defendant breached the duty of good  
2 faith, I am obligated to determine the purpose of the  
3 agreement; that is, the benefits the parties expected at  
4 the time the agreement was made. This duty of good  
5 faith means that each party to a contract will not do  
6 something which will have the effect of injuring or  
7 destroying the rights of the other party to receive the  
8 benefits of the contract.

9 A contracting party can breach the duty of good  
10 faith even if he did not violate an express term of the  
11 contract. It is not a duty of good faith -- a breach of  
12 duty of good faith, if a course of action available to  
13 the plaintiff could have been avoided or that plaintiff  
14 could have avoided the harm and this course of conduct  
15 was not followed.

16 I'll come back to this last sentence with regard to  
17 the conduct of Betco. I'll start with what is properly  
18 the focus of the claim here and that is the conduct of  
19 Mr. Peacock. I do find that in the course of his duties  
20 as the ongoing manager of the company, that he generally  
21 discharged those duties as required, although there's no  
22 question, as I've indicated on this record, that  
23 Mr. Peacock's conduct was not above reproach, and I can  
24 certainly understand Betco's frustration with respect to  
25 his lack of engagement in the problems which existed in

1 the company.

2 I don't think that it is a breach, and I do not  
3 find a breach of duty of good faith, because Mr. Peacock  
4 failed to immediately disclose all of the warts that  
5 existed with the current operation of the company. I do  
6 think, and I do find, that not only Mr. Peacock, but an  
7 objectively reasonable person would have believed that  
8 the operations of the company which had been successful  
9 and had resulted in a profitable enterprise and ongoing  
10 business value as a profitable enterprise could continue  
11 in operation as it was generally. And more to the  
12 point, that with respect to the claims of failing to  
13 disclose, that it was manifestly obvious, and  
14 Mr. Peacock had no reason to think that it was not  
15 obvious, that there were problems with this plant with  
16 respect to its boilers, with respect to its production  
17 processes, and to a lesser extent, and I'll come back to  
18 this, with respect to the testing of products before  
19 shipping. And the reason for this is numerous. This  
20 plant was not a model of efficiency. It had obvious  
21 problems just by an examination of the plant itself.  
22 Anyone coming in, as Mr. Kennedy did later, was able to  
23 identify reasons why there would not be consistent  
24 results in terms of the production of the bacteria that  
25 -- the targeted bacteria and opportunities, obvious

1 opportunities for contamination. And yet overall,  
2 Mr. Peacock, over a long period of time was able to grow  
3 his company into a profitable enterprise. I do not  
4 think that Betco was entitled to disclosure, and in  
5 fact, I think the law is quite clear they were not  
6 entitled to disclosure by Mr. Peacock of matters that  
7 were obvious to them as were the problems with the  
8 boilers, the production process, and as I say, to a  
9 lesser extent the testing process.

10 Indeed by March of 2011, they had the benefit of a  
11 detailed memo setting forth most of those problems, even  
12 if they didn't have reason to know of them  
13 independently, and I really do think they did and I  
14 think the evidence makes that clear and so I find.

15 As I've indicated, I think there are two exceptions  
16 to that. One is for product that went out the door  
17 without testing or adequate testing, including the  
18 liquid product, but to a lesser extent some of the other  
19 product. And the problem with specifying what that was  
20 is that the evidence was not entirely clear, and to the  
21 extent it was not clear, I think that falls on the  
22 plaintiff's burden of proof.

23 The second exception is product that went out the  
24 door with certificates of analysis that were essentially  
25 made up out of whole cloth. Mr. Peacock should have



1 known -- he either knew or he should certainly have  
2 known as the operator of the plant that these practices  
3 were occurring, and under a duty of good faith he also  
4 should have known that this would not be something  
5 easily discovered by plaintiff Betco.

6 He also certainly knew that the discovery of those  
7 problems outside of the first year of the contract and  
8 outside of the second year of the contract would have  
9 implications under the contract for the plaintiff. And  
10 I do think that the failure to come forward constitutes  
11 a violation of the duty of good faith and fair dealing.  
12 But as I've indicated at the outset, for a breach of a  
13 duty of good faith to occur, it's a fact requires injury  
14 or destroying the rights of the other party to the  
15 contract. And that's where I'm left wanting.

16 Although I will not preclude the plaintiff from  
17 attempting to prove injury, I think there's no evidence  
18 on this record of it. And the reason is fairly  
19 straightforward. Sec. 4.19, the product warranty  
20 provision, contemplates that the seller be responsible  
21 for failures to conform with the applicable contractual  
22 commitments and all express and implied warranties. The  
23 theory of the plaintiff is that had they become aware of  
24 the inconsistencies with respect to certificates of  
25 analysis or the lack of testing, adequate testing of

1 product or complete testing of product, that they would  
2 have brought a general breach of contract claim and that  
3 their remedy, as I understand it, would have been to  
4 renegotiate the entire pricing of the agreement. I do  
5 not find that to be the remedy available. I do not find  
6 the general representation under 4.19 to be clearly in  
7 breach.

8       Even if I were to limit that to the seller, the  
9 representation that the seller had been in conformity  
10 with all applicable contractual commitments and all  
11 express and implied warranties that is in the context of  
12 a larger guarantee, a series of guarantees that  
13 Mr. Peacock was giving to the buyer with respect to  
14 controlling liability for past sales. Once he  
15 relinquished control of the company and Betco became the  
16 owner, to the extent he was obligated to disclose on a  
17 going forward basis, and again this is -- it's not clear  
18 to me he would be obligated to disclose past failures,  
19 although I have found that he certainly knew of the  
20 potential claim, I don't think he would have known that  
21 the buyer Betco could have undone the entire contract by  
22 virtue of these departures from commitments to clients.  
23 At the end of the day, the remedy for ongoing failures  
24 to deliver product as contemplated by the certificate of  
25 analysis or by the specifications to a customer is to

1 fulfill that obligation. I think it would be  
2 unreasonable under the circumstances here to conclude  
3 that Betco gets to completely rewrite the contract.

4 They got what they say they intended to get in the  
5 purchase. They got a company, warts and all, that was  
6 producing at a profitability level under current  
7 practices to the satisfaction of its customer base under  
8 that practice.

9 Now, to the extent that they had other ideas, it  
10 isn't spelled out in this contract even in this, what I  
11 really do believe would be a conflated right under 4.19  
12 of the contract, and I don't think it would have been a  
13 basis, and I do not find it a basis, to undo the  
14 contract itself or to rewrite the purchase term of the  
15 contract. At best, it is a basis, this breach, to hold  
16 Mr. Peacock accountable for the consequences of the  
17 ongoing failures to comport with the certificate of  
18 analysis and the specs, and that is the only injury I  
19 can find. But that injury is not apparent to the Court  
20 on this record; that is to say, it doesn't appear that  
21 any customers post-sale complained about the quality of  
22 the product they received any more than they did before,  
23 and in particular, raised any challenges to a breach of  
24 contract by Bio-Systems for false certificates of  
25 analysis or for inaccurate specifications.

1 Unless there is some arising injury, then there is  
2 not a breach of the duty of good faith. That's the  
3 Court's ruling, but I will hear briefly from plaintiff  
4 if they believe they have damages they can show that  
5 arise directly out of sales of product with inaccurate  
6 certificates of analysis or of product before  
7 acquisition or post-acquisition. And I'll hear from  
8 plaintiff on that point.

9 MR. JACKSON: Your Honor, on the issue of can  
10 we introduce evidence of bad customers, claims that they  
11 have made about defective product, we're not prepared to  
12 provide that evidence at this time.

13 THE COURT: I understand. And for that reason  
14 I'm going to find no breach of the duty of good faith.  
15 I will follow up with a written opinion which will  
16 reflect, I think for the most part, what I've just told  
17 you orally because I needed to provide you an oral  
18 ruling. Once that is in place, I will enter judgment  
19 and I suspect that plaintiff disagrees with my reading  
20 of the law and you'll have an opportunity to read -- to  
21 appeal that ruling.

22 I would say to both sides that I don't think that's  
23 necessarily a healthy way to proceed. There is some  
24 question, I suppose, as to the proper remedy and a  
25 three-judge panel in the Seventh Circuit has found me to

1 be mistaken in the past and they may find it here,  
2 although obviously as a trier of fact that's a more  
3 difficult road to hoe for the plaintiff. That may  
4 happen. I think it would make more sense for the  
5 parties to try to reach resolution, but I do not involve  
6 myself in that and at this point neither does our  
7 standard mediator, Mr. Oppeneer.

8       You will be contacted, I'm certain, by the Seventh  
9 Circuit mediators who are quite aggressive and will try  
10 to encourage the parties to reach resolution. I would  
11 encourage both sides to consider that.

12       Was there something more for the plaintiff before  
13 we adjourn? I should say recess.

14       MR. JACKSON: No, Your Honor. And thank you  
15 for allowing us to present our case.

16       THE COURT: As I say, I have appreciated both  
17 sides' presentations. I think they were done very  
18 professionally. The clients were well served. You have  
19 a record that I think will at least highlight the  
20 issues, legal issues for the Court of Appeals, as well  
21 as basic findings by this Court. And I thank both sides  
22 for that.

23       Anything more for the defendants at this time?

24       MR. BIANCHI: Your Honor, we would just ask if  
25 you have a specific timing for briefing on attorneys'

1 fees?

2 THE COURT: And those are available under the  
3 contract? I hadn't focused on that.

4 MR. BIANCHI: Yes, Your Honor. Under Section  
5 10.5(e) it says in the event of the parties -- it was in  
6 our proposed findings that were agreed upon -- "that the  
7 prevailing parties' attorney's fees and costs shall be  
8 made by the nonprevailing party."

9 THE COURT: How much time to submit your claim  
10 for fees?

11 MR. BIANCHI: By next Friday. Is that fair  
12 enough?

13 THE COURT: So a week from this Friday your  
14 submissions will be due. I would require that you  
15 provide the backup, including your own internal data  
16 keeping for your time in this matter and proof of all  
17 invoices to your clients and the amount paid to date by  
18 your client. To the extent that there is a dispute over  
19 the claim for fees, I will require that the defendants'  
20 counsel provide the same information to the Court along  
21 with their opposition. And I'll give you two weeks, 14  
22 days to file any opposition to the claim. Yes.

23 MR. JACKSON: Just so I'm clear when you said  
24 to provide the same information, are you -- are you  
25 asking from us our fees?

1 THE COURT: I'm asking for your invoices to  
2 your client, amount paid by your client to date, and  
3 your time records if you -- you don't have to provide it  
4 if you don't oppose it. But if you're going to oppose  
5 it, then I will require production of those things. If  
6 you believe portions of it, and it would only be  
7 portions of it disclose attorney/client, you can do that  
8 under seal to the Court, but the invoice, unless it goes  
9 into substantial more detail than most, is not going to  
10 prevent disclosure to the other side nor certainly will  
11 the fact of payment.

12 MR. JACKSON: That's in the event we oppose.

13 THE COURT: In the event you oppose. Exactly  
14 right.

15 MR. JACKSON: Okay. Thank you.

16 THE COURT: Anything more for the defendant?

17 MR. BIANCHI: No. Thank you.

18 THE COURT: Again, I thank you both sides. And  
19 we're in recess.

20 (Proceedings concluded at 11:00 a.m.)

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1 I, LYNETTE SWENSON, Certified Realtime  
2 and Merit Reporter in and for the State of Wisconsin,  
3 certify that the foregoing is a true and accurate record  
4 of the proceedings held on the 17th day of June 2015  
5 before the Honorable William M. Conley, Chief Judge for  
6 the Western District of Wisconsin, in my presence and  
7 reduced to writing in accordance with my stenographic  
8 notes made at said time and place.  
9 Dated this 20th day of July 2015.

10  
11 /s/ \_\_\_\_\_  
12 Lynette Swenson, RMR, CRR  
13 Federal Court Reporter  
14  
15

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